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THE CONSUMER FINANCIAL PROTECTION AGENCY:
LOVE IT OR HATE IT, U.S. FINANCIAL REGULATION NEEDS IT

ANN GRAHAM*

I. INTRODUCTION

AS the United States economy begins a tentative recovery from recession,¹ Congress is debating financial regulatory reform legislation.² Whether a stand-alone consumer financial protection agency becomes a centerpiece of the new regulatory regime or a throw-away bargaining chip remains to be seen.³ In any assessment of the subprime-mortgage-crisis-gone-global, with the benefit of hindsight, failures of consumer protection loom large.⁴

* Professor of Law, Texas Tech University School of Law. Special thanks to members of the Villanova Law Review and Professor Jennifer O'Hare, as well as Elizabeth Brown, Eric Pan, Joan MacLeod Heminway, and Harvey Goldschmid. Thanks also to AALS colleagues Art Wilmarth, Patricia McCoy, Heidi Schooner, Kathleen Keest, Elizabeth Schiltz, and Christopher Peterson.

1. See Federal Reserve Board, *The Beige Book*, Jan. 13, 2010, <http://www.federalreserve.gov/FOMC/BeigeBook/2010/20100113/default.htm>.

2. See The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009) (passed by U.S. House of Representatives on Dec. 11, 2009, and awaiting Senate passage of financial reform legislation); see generally Stacy Kaper, *Obstacle Course Awaits Senate Reg Reform Bill*, AM. BANKER, Jan. 4, 2010, <http://www.financial-planning.com/news/Reform-Dodd-Senate-FDIC-2665264-1.html> ("Passing a regulatory reform bill through the House was a bruising, months-long fight that appeared ready to spin out of control. That battle may pale in comparison to the legislation's progress through the Senate.").

3. See Damian Paletta, *Consumer Protection Agency in Doubt: Dodd Weighs Dropping Idea of Creating Independent Body in Bid to Get Financial Regulatory Revamp Passed This Year*, WALL ST. J., Jan. 15, 2010, <http://online.wsj.com/article/SB10001424052748704363504575003360632239020.html>.

4. See Letter from Professors of Consumer Law and Banking Law, American Law Schools, to Christopher J. Dodd, Chairman, Comm. on Banking, Hous., and Urban Affairs, U.S. Senate; Richard C. Shelby, Ranking Member, Comm. on Banking, Hous., and Urban Affairs, U.S. Senate; Barney Frank, Chairman, Fin. Servs. Comm., U.S. House of Rep.; and Spencer Bachus, Ranking Member, Fin. Servs. Comm., U.S. House of Rep. (Sept. 29, 2009), <http://law.hofstra.edu/pdf/Media/consumer-law%209-28-09.pdf>. This letter, titled a *Statement in Support of Legislation Creating a Consumer Financial Protection Agency*, was joined by more than eighty professors who teach courses related to consumer and banking law at American law schools. *Id.* The letter listed twenty-one scholarly articles "critical of regulatory rulemaking and decisional outcomes in the area of consumer financial products" as background for the proposition that

regulatory approaches at the existing agencies, whose jurisdiction includes but does not focus on consumer financial products . . . place a higher value on protecting the interest of financial product vendors who promote complex debt instruments using aggressive sales practices, than they do on protecting the interests of consumers in transparent, safe, and fair financial products.

In the wake of this crisis, just as in the aftermath of the banking collapse of the 1930s, Congress has an opportunity to restructure a broken financial regulatory system. More than band-aids are required. If the reforms Congress now adopts are to secure a lengthy period of financial stability, as was the case following the New Deal era's re-envisioning of financial regulation,⁵ consumer protection cannot continue to be marginalized. Congress has an opportunity to demonstrate leadership as it considers the creation of a new, independent agency whose sole mission is to protect consumers of financial products from the abuses which contributed to the present financial crisis. The prospect of such a major shift in the allocation of regulatory authority sets the stage for heated debate between consumer protection advocates and beneficiaries of the status quo in both the federal regulatory agencies and the financial services industry.⁶

On June 17, 2009, President Barack Obama's administration announced a plan to overhaul U.S. financial regulation.⁷ The White Paper, *Financial Regulatory Reform—A New Foundation: Rebuilding Financial Services*,⁸ was quickly followed by an administration-supported bill, The Consumer Financial Protection Act of 2009,⁹ filed in the House of Representatives on July 9, 2009, by House Financial Services Chairman Barney Frank (D-MA) and twelve other sponsors.¹⁰ Based on economic suffering and political outrage from "Main Street" directed at "Wall Street" for causing the financial crisis, the Obama administration and Committee Chairman Frank an-

Id.

5. See generally RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 20 (4th ed. 2009) (describing "Years of Stability: 1934-1980").

6. See Bob Herbert, Op-Ed., *Chutzpah on Steroids*, N.Y. TIMES, at A25, July 13, 2009; see also Elizabeth Warren, Editorial, *Wall Street's Race to the Bottom*, WALL ST. J., Feb. 8, 2010, http://online.wsj.com/article/SB10001424052748703630404575053514188773400.html?mod=rss_Today's_Most_Popular.

7. See Press Release, The White House, Office of the Press Secretary, President Obama To Announce Comprehensive Plan for Regulatory Reform (June 17, 2009), available at http://www.whitehouse.gov/the_press_office/President-Obama-to-Announce-Comprehensive-Plan-for-Regulatory-Reform/.

8. See Dept. of the Treasury, *Financial Regulatory Reform—A New Foundation: Rebuilding Financial Supervision and Regulation*, http://www.financialstability.gov/docs/regs/FinalReport_web.pdf [hereinafter *White Paper on Financial Regulatory Reform*].

9. H.R. 3126, 111th Cong. (2009), http://www.house.gov/apps/list/press/financialsvcs_dem/21frank_011.xml.pdf; see also Press Release, House Financial Services Committee, Frank Introduces Obama Administration's Plan to Increase Consumer Protection (July 9, 2009), available at http://www.house.gov/apps/list/press/financialsvcs_dem/press_070809.shtml.

10. The other twelve sponsors of the bill were Representatives Maxine Waters (D-CA), Carolyn Maloney (D-NY), Luis Gutierrez (D-IL), Mel Watt (D-NC), Gary Ackerman (D-NY), Brad Sherman (D-CA), Michael Capuano (D-MA), Brad Miller (D-NC), Al Green (D-TX), Keith Ellison (D-MN), Jackie Speier (D-CA), and Alan Grayson (D-FL).

ticipated prompt passage of regulatory reform legislation.¹¹ Throughout the fall of 2009, however, the House wrangled over financial regulatory reform legislation. On December 11, 2009, the House passed The Wall Street Reform and Consumer Protection Act,¹² by a vote of 223 to 202, demonstrating a sharply partisan Democrat/Republican divide. The Consumer Financial Protection Agency Act is Title IV of the Wall Street Reform and Consumer Protection Act.¹³

This Article analyzes The Consumer Financial Protection Agency Act of 2009, as passed by the House of Representatives. Each Section of this Article identifies a key point of controversy, with arguments pro and con, coming down in favor of an independent consumer financial protection agency. In conclusion, a final Section summarizes political realities, including a 2010 U.S. Supreme Court case affecting campaign finance, which will impact prospects for a consumer financial protection agency (CFPA).

II. A CONSUMER FINANCIAL PROTECTION AGENCY: STRUCTURE, SCOPE OF AUTHORITY, ROLE OF THE STATES, AND ROLE OF GOVERNMENT IN CONSUMER PROTECTION

As originally envisioned in the Obama administration's White Paper,¹⁴ the CFPA would be a new, independent federal agency, with stable funding, broad jurisdiction, and sole rulemaking authority for all consumer financial protection statutes. The new agency would have supervisory and enforcement authority over all entities, regardless of charter, that are covered by existing and future consumer financial statutes. The agency's mission would be to: protect consumers of financial products and services, regulate unregulated financial institutions, centralize consumer financial protection, minimize inconsistencies in regulation, and address

11. See, e.g., Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201-7266 (2002). By comparison, following the Enron accounting scandal resulting in Chapter 11 filing on Dec. 2, 2001, Congress passed the Sarbanes-Oxley Act of 2002 in short order. On July 30, 2002, President Bush signed into law what he called "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt." George W. Bush, *Remarks on Signing the Sarbanes Oxley Act of 2002*, in 38 Weekly Comp. Pres. Doc. 1283, 1284 (Aug. 5, 2002), <http://frwebgate4.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=284337166365+1+1+0&WASAction=retrieve>. At that time, Congress promptly took a hard line against corporate abuses that the current Congress has yet to match. In his signing statement, President Bush went on to say, "This new law sends very clear messages that all concerned must heed. This law says to every dishonest corporate leader: 'You will be exposed and punished. The era of low standards and false profits is over. No boardroom in America is above or beyond the law.'" *Id.*

12. H.R. 4173, 111th Cong. (2009), http://docs.house.gov/rules/finserv/111_hr_finsrv.pdf; see also Press Release, Nancy Pelosi, Speaker of the House, Pelosi: Wall Street Reform Bill Will Protect Main Street from the Worst of Wall Street (Dec. 11, 2009), available at http://www.speaker.gov/newsroom/press_releases?id=1471.

13. See H.R. 4173.

14. See *White Paper on Financial Regulatory Reform*, *supra* note 8.

the reality that consumer protection issues have been slighted by agencies with other responsibilities, such as the safety and soundness and profitability of insured depository institutions.

Opinions about the agency were sharply divided from the outset.¹⁵ Controversial issues discussed in this Article include: (1) Is it necessary to establish a new federal agency for consumer financial protection or can consumer protection be assured through the existing federal financial regulators? (2) Can consumer protection compliance be separated from "safety-and-soundness" regulation? (3) What entities should be subject to the authority of a consumer financial protection regime? (4) Should a new consumer financial protection agency have centralized rulemaking authority for existing and future consumer protection laws? (5) What examination and enforcement authority should a new consumer financial protection agency have and how should that authority be coordinated with other regulators? (6) Should a consumer financial protection agency have a single head or be governed by a multi-member board? (7) How can the new consumer financial protection agency be staffed? (8) What funding structure is optimal?

Other key issues deal with the philosophy of government regulation of financial institutions: (9) Should financial institutions be required to offer "plain vanilla" financial products? (10) Will a new consumer financial protection agency result in more government regulation, stifle "innovation," and increase the cost of financial products and services?

The role of States in consumer financial protection occupies much of the debate: (11) Can States retain concurrent authority over consumer

15. See, e.g., *Addressing the Need for Comprehensive Regulatory Reform: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Banking Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Community and Consumer Advocates' Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Federal Regulator Perspectives on Financial Regulatory Reform: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Perspectives on the Consumer Financial Protection Agency: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Regulatory Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *The Administration's Plan for the Restructuring of the American Financial Regulatory System: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009); *The Administration's Proposals for Financial Regulatory Reform: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2009). The myriad of titles of the hearings indicates the diversity of views expressed. All hearings are available at http://financialservices.house.gov/hearings_all.shtml.

financial protection and, if so, what is the appropriate measure of federal preemption in the financial institutions arena?

A. *Is It Necessary to Establish a New Federal Agency for Consumer Financial Protection or Can Consumer Protection Be Assured through Existing Federal Financial Regulators?*

Cogent reasons exist for establishing a new federal agency for consumer financial protection rather than relying on existing federal financial regulators. First, the subprime mortgage meltdown, which led to national and global economic crisis, was caused in large part by consumer protection failures. Consumer abuses were rampant. “Teaser rate” loans were re-priced to become unaffordable.¹⁶ Predatory loan terms and practices—including loan flipping, fee packing, equity stripping, and steering low income and minority borrowers to expensive, unsuitable mortgage loan products—had become standard.¹⁷ U.S. Treasury Secretary Timothy Geithner has identified “pervasive failures in consumer protection, leaving many Americans with obligations they did not understand and could not sustain,”¹⁸ as a primary cause of “the most severe global financial crisis in generations.”¹⁹ Geithner testified before the House Financial Services Committee that “weaknesses in our consumer and investor protections harm individuals, undermine trust in our financial system, and can contribute to systemic crises that shake the very foundations of our financial system.”²⁰ According to Nobel Laureate Dr. Joseph Stiglitz, “[I]t was the subprime mortgages, irresponsible loans made to uninformed individuals beyond their ability to pay, designed to generate bankers fees as they robbed the poor of their life savings, that began the unraveling of our financial system.”²¹

16. See Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 970 (2009) (explaining problem of “teaser rate” loans).

17. See, e.g., Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2043 (2007) (defining predatory lending as syndrome of loan abuses); see also Edward M. Gramlich, Governor, Fed. Reserve Bd., *An Update on the Predatory Lending Issue*, Remarks at the Texas Ass’n of Bank Counsel 27th Annual Convention (Oct. 9, 2003), <http://www.federalreserve.gov/boarddocs/speeches/2003/20031009/default.htm> (describing characteristics of predatory lending and subprime lending).

18. *Addressing the Need for Comprehensive Regulatory Reform: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 1 (2009) (statement of Timothy F. Geithner, Secretary, United States Treasury), http://www.house.gov/apps/list/hearing/financialsvcs_dem/geithner032609.pdf.

19. *Id.* at 1.

20. *Id.* at 4.

21. *Compensation in the Financial Industry: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 5-6 (2010) (statement of Dr. Joseph E. Stiglitz, Professor, Columbia University), http://www.house.gov/apps/list/hearing/financialsvcs_dem/stiglitz.pdf.

Second, inadequate disclosures of loan terms and inherently deceptive loan products damage not only individual consumers, but also the entire U.S. mortgage market and national economy. Harvard Law Professor Elizabeth Warren, Chair of the Congressional Oversight Panel and an early proponent of an independent consumer financial protection agency,²² explains the need for a consumer financial protection agency in five words: “The Credit Market Is Broken.”²³ Warren says, “The broken credit market caused the current crisis, is perpetuating the crisis, and will cause future crises—unless we fix it.”²⁴ One of the most basic failures of the credit market, which could be remedied by an effective consumer financial protection agency, results from the fact that financial products are designed to preclude meaningful comparison and consumer choice. Disclosures in incomprehensible terminology and fine print lure consumers to succumb to “tricks and traps.”²⁵ The lack of understandable credit term disclosures harms both individual consumers and our economy as a whole. Beyond inflicting economic damage on individual borrowers, deceptive terms in financial products negatively impact the operation of the free market system. Dr. Stiglitz, a strong proponent of a “financial products safety commission,” points out that markets fail to produce efficient outcomes when information is imperfect or asymmetric.²⁶ In his view, an independent consumer financial protection agency should require transparency in financial products, regulate incentives, and curb risky and exploitive practices.²⁷

The third and most persuasive argument for a new, independent consumer financial protection agency is that the existing federal agencies

22. See generally Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY: J. OF IDEAS 8 (2007), <http://www.democracyjournal.org/article.php?ID=6528>. Warren notes that:

It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won’t even carry a disclosure of that fact to the homeowner.

Id. at 8.

23. See YouTube: Elizabeth Warren on Proposed CFPA (Consumer Financial Protection Agency), AmericanNewsProject (June 17, 2009), <http://www.youtube.com/watch?v=i6OaHGPE94>; YouTube: Professor Elizabeth Warren Speaks about the Consumer Financial Protection Agency, American4FinanReform (July 17, 2009), <http://www.youtube.com/watch?v=IYd08e5Cjvs>. In an effort to address the arguments for the CFPA to a broad audience, Professor Warren’s YouTube videos explain the need for better consumer financial protection.

24. YouTube: Professor Elizabeth Warren Speaks about the Consumer Financial Protection Agency, *supra* note 23.

25. *Id.*

26. See *The Future of Financial Services Regulation: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. (2008) (statement of Dr. Joseph E. Stiglitz, Professor, Columbia University), <http://financialservices.house.gov/hearing110/hr102108.shtml>.

27. *Id.*

have failed to protect consumers.²⁸ Allowing responsibility for consumer protection to remain where it currently resides and providing no materially different structure to assure consumer protection in the future is unacceptable to consumer protection advocates, including Committee Chairman Frank, who says:

No one familiar with the track record of the bank regulatory agencies with respect to protecting consumers can deny the need for an independent agency if we are going to have effective consumer protection. Bank regulators have traditionally treated their responsibilities for consumer protection as a second priority.²⁹

The existing federal financial institution regulators, the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Federal Reserve Board (FRB), and the Federal Deposit Insurance Corporation (FDIC), view their primary responsibility as protecting the “safety and soundness” and profitability of their supervised institutions—an objective that can and often does conflict with consumer protection.³⁰ Agency funding comes from fees and assessments on the entities supervised,³¹ resulting in marketing charters on the basis of ability to avoid state consumer protection laws.³² Agencies that possessed the legal

28. See *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearings Before the H. Comm. on Fin. Servs.*, 111th Cong. (2009) (statement of Travis Plunkett, Legislative Director, Consumer Federation of America, and Edmund Mierzwinski, Director, Consumer Program, U.S. PIRG), http://www.house.gov/apps/list/hearing/financialsvcs_dem/mierzwinski_-_submitted_with_plunkett.pdf (detailing specific agency failures to address consumer protection).

29. See Press Release, House Financial Services Committee, Frank Statement on Consumer Protection (Feb. 9, 2010), available at http://www.house.gov/apps/list/press/financialsvcs_dem/pressCFPA_02092010.shtml.

30. See *Regulatory Restructuring: Safeguarding Consumer Protection and the Role of the Federal Reserve: Hearing Before the Subcomm. on Domestic Monetary Policy and Tech. of the H. Comm. on Fin. Servs.*, 111th Cong. 18-20 (2009) (statement of Patricia A. McCoy, Director, Insurance Law Center, University of Connecticut), http://www.house.gov/apps/list/hearing/financialsvcs_dem/mccoy_house_testimony—hearing—july_16_2009.pdf.

31. See, e.g., *Credit Card Practices: Current Consumer & Regulatory Issues: Hearings Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. (2007) (statement of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School), <http://financialservices.house.gov/hearing110/htwilmarth042607.pdf>. For example,

More than 95% of the OCC’s budget is financed by assessments paid by national banks, and the twenty biggest national banks account for nearly three-fifths of those assessments . . . Thus, the OCC has a powerful financial interest in pleasing its largest regulated constituents, and the OCC therefore faces a clear conflict of interest whenever it considers the possibility of taking an enforcement action against a major national bank.

Id. at 16.

32. See, e.g., Press Release, Office of the Comptroller of Currency, Comptroller Calls Preemption a Major Advantage of National Bank Charter (Feb. 12, 2002), available at <http://www.occ.gov/speeches.htm>. For examples of how the OCC

authority to curb abusive lending practices stalled the rulemaking process even as Congress pressed for action.³³

Leading consumer advocacy groups favoring the establishment of an independent consumer financial protection agency include: Consumer Federation of America, U.S. PIRG, ACORN, Americans for Fairness in Lending, Consumer Action, Center for Digital Democracy, Consumers Union, Demos, National Association of Consumer Advocates, National Consumer Law Center, National Fair Housing Alliance, National People's Action, Public Citizen, and Center for Responsible Lending.³⁴

The existing federal financial institution regulators acknowledge failures of consumer protection, but oppose key aspects of the Administration's proposal for an independent consumer financial protection agency. The regulators principally oppose: allowing States to set more stringent standards than those set by the CFPB, granting the CFPB examination authority over banks and thrifts, and separating consumer protection from prudential regulation.³⁵

Financial services industry trade groups vigorously oppose the creation of a new, independent consumer financial protection agency.³⁶ In-

used federal preemption to shield national banks from state consumer protection laws, see *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009); *Watters v. Wachovia Bank*, 550 U.S. 1 (2007); and *Wells Fargo v. James*, 321 F.3d 488 (5th Cir. 2003), which are discussed more fully at Section D, *infra*.

33. For example, despite a series of hearings during the summer of 2006, it was not until January 2008 that the Federal Reserve Board belatedly exercised its authority to *propose* consumer protection amendments to the Regulation Z, which implements the Truth in Lending Act (TILA) and the Home Owners Equity Protection Act (HOEPA). The Federal Reserve's Final Rule issued July 30, 2008, and is partially effective Oct. 1, 2009, and partially effective April 1, 2010. See 73 Fed. Reg. 44522 (July 30, 2008) (providing background for Final Rule); Press Release, Federal Reserve Board (May 3, 2007), *available at* <http://www.federalreserve.gov/newsevents/press/bcreg/20070503a.htm> (describing four public hearings conducted during summer of 2006 and additional public hearing during summer of 2007). Despite public outcry and the collapse of the subprime mortgage market, the Federal Reserve delayed this basic consumer protection action for more than four years. See Press Release, House Financial Services Committee, The Federal Reserve's Record on Consumer Protection (Sept. 23, 2009), *available at* http://www.house.gov/apps/list/press/financialsvcs_dem/pressfr_092309.shtml (providing "a report card demonstrating the poor record of the Federal Reserve in using the tools provided by Congress to protect consumers from abusive financial industry practices").

34. See Statements of Plunkett and Mierzwinski, *supra* note 28 (identifying principal consumer organizations and providing well-researched analysis of issues surrounding consumer financial protection agency proposal).

35. See generally *Regulatory Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. (2009) (statements of Sheila C. Bair, Chairman, Federal Deposit Insurance Company; Ben S. Bernanke, Chairman, Federal Reserve Board; John E. Bowman, Acting Director, Office of Thrift Supervision; and John C. Dugan, Comptroller of the Currency, Office of Comptroller of the Currency), http://www.house.gov/apps/list/hearing/financialsvcs_dem/hrfc_072409.shtml.

36. See Press Release, Financial Services Roundtable, Roundtable Opposes Consumer Financial Protection Agency (June 30, 2009), *available at* <http://www.fs>

dustry trade groups that have been particularly vocal in opposing the creation of a new Consumer Financial Protection Agency include: American Bankers Association, Financial Services Roundtable, and Independent Community Bankers of America. The U.S. Chamber of Commerce has also opposed the CFPA.³⁷ Financial institutions fighting establishment of a CFPA charge that creating a new, independent agency with primary jurisdiction over consumer financial protection would: increase regulatory burden, inappropriately separate consumer protection from prudential regulation, stifle innovation, unfairly burden small financial institutions, destroy uniformity of regulation by allowing States to impose higher consumer financial protection standards, and increase the cost of financial products and services to consumers.³⁸ Financial industry lobbyists have mobilized substantial resources in opposition to the CFPA.³⁹ A significant number of small business groups, on the other hand, support the FCPA.⁴⁰

B. *Can Consumer Protection Compliance Be Separated from
"Safety-and-Soundness" Regulation?*

A key concern is whether consumer financial protection regulation can or should be compartmentalized. Prudential regulation, which emphasizes financial solvency, must take account of the consumer protection performance of a financial institution to assure long-term viability. Safety-and-soundness and consumer protection have long been regarded by the best bank regulators as complementary rather than contradictory.

round.org/media/htm09/roundtable_opposes_consumer_financial_protection_agency.html; see also *Perspectives on the Consumer Financial Protection Agency: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. (2009) (statements of R. Michael S. Menzies, Sr., on behalf of the Independent Community Bankers of America, and Edward L. Yingling, President and Chief Executive Officer, American Bankers Association) (Sept. 30, 2009), http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr_092309.shtml.

37. See *Perspectives on the Consumer Financial Protection Agency: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. (2009) (statement of Andrew J. Pincus, on behalf of the U.S. Chamber of Commerce) http://www.house.gov/apps/list/hearing/financialsvcs_dem/pincus_-_chamber.pdf.

38. See *supra* notes 36 and 37. But see Statements of Plunkett and Mierzwinski, *supra* note 28 (providing rebuttal to arguments against CFPA); see also Elizabeth Warren, *Three Myths about the Consumer Financial Product Agency*, THE BASELINE SCENARIO, July 21, 2009, <http://baselinescenario.com/2009/07/21/three-myths-about-the-consumer-financial-product-agency>.

39. See Press Release, The White House, Remarks by the President on Consumer Financial Protection (Oct. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Consumer-Financial-Protection.

40. See Press Release, Business for Shared Prosperity, Business Owners Want Strong Consumer Financial Protection Agency, Say Senate Should Stop Protecting Wall Street (Feb. 9, 2010), *available at* <http://www.businessforsharedprosperity.org/news/Business+Owners+Want+Strong+Consumer+Financial+Protection+Agency%2C+Say+Senate+Should+Stop+Protecting+Wall+Street>.

The existing federal regulators argue that consumer compliance should not be separated from prudential regulation.⁴¹ Without doubt, consumer protection failures can negatively impact the soundness of a financial institution. The subprime mortgage collapse demonstrates that when financial institutions pursue short-term profits at the expense of consumers, bank failures result. Federal regulators should have been monitoring both profitability and consumer abuses. The problem with an argument to preserve the regulatory status quo is that prudential regulators had the authority and the opportunity to regulate predatory lending products and tactics at the heart of the subprime debacle, but they failed to do so until too late. Although each existing federal financial regulatory agency has a consumer protection division and compliance examination staff, these departments are overshadowed in terms of resources and respect from the agencies' top management by the safety-and-soundness supervision divisions.

A new consumer financial protection agency would have the advantages of: a single focus on consumer protection, independence from the industry and the regulators that have slighted consumer protection in the past, a clear directive to elevate consumer protection, and the requirement "to consult with other federal regulators to promote consistency with prudential, market, and systemic objectives."⁴² A single consumer financial protection agency would eliminate inconsistencies in regulation among several federal agencies which have resulted in "charter shopping" by financial institutions seeking the least restrictive alternative.

C. *What Entities Should Be Subject to the Authority of a Consumer Financial Protection Regime?*

One of the principal reasons for establishing a consumer financial protection agency is to protect consumers of all types of financial products and services. This represents an effort to regulate unregulated financial institutions and centralize consumer financial protection so as to minimize inconsistencies in regulation. A positive aspect of the proposal is the regulation of previously unregulated providers of financial products and services. This is long overdue. Had all mortgage brokers and lenders been subject to a level playing field of consumer protection oversight, many of the abuses leading to the subprime mortgage meltdown might have been controlled.

41. See *Regulatory Perspectives on the Obama Administration's Financial Regulatory Reform Proposals*, *supra* note 35.

42. *White Paper on Financial Regulatory Reform*, *supra* note 8, at 59.

Draft legislation proposed by the Administration⁴³ defined “consumer financial product or service,”⁴⁴ “financial activity,”⁴⁵ and “covered person”⁴⁶ broadly, with the intention of conferring jurisdiction over all companies, regardless of size or charter, that provide financial deposit and savings products, consumer credit and loan servicing, real estate appraisal and settlement, collection, check guarantee, consumer report, financial advisory, financial data processing, money transmitting, stored value, or other products or services for consumers, as designated by CFPB rule. The draft legislation granted the CFPB specific authority for sixteen consumer protection statutes, including: Alternative Mortgage Transaction Parity Act, Community Reinvestment Act, Consumer Leasing Act, Electronic Funds Transfer Act, Equal Credit Opportunity Act, Fair Credit Billing Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, certain provisions of the Federal Deposit Insurance Act, certain provisions of the Gramm-Leach-Bliley Act, Home Ownership and Equity Protection Act, Real Estate Settlement Procedures Act, S.A.F.E. Mortgage Licensing Act, Truth in Lending Act, and Truth in Savings Act.⁴⁷

Although the initial proposal was to establish a watchdog agency with jurisdiction over all types of consumer financial products and services offered by any entity engaged in the provision of financial products and services to consumers, the industry lobbying and legislative horse-trading began immediately. In the House-passed bill, H.R. 4173,⁴⁸ small community banks and credit unions, defined as those insured depository institutions with total assets of \$10,000,000,000 or less,⁴⁹ would continue to be examined for consumer compliance as well as for safety-and-soundness, not by the CFPB but by their primary federal regulator. Realtors⁵⁰ and auto dealers,⁵¹ although they are substantially involved in consumer credit products and services for home and car purchases, would be exempt from coverage. Credit extended directly by a merchant and debt collection by a merchant are excluded from the CFPB’s jurisdiction.⁵² Entities regulated by the Securities and Exchange Commission (SEC),⁵³ the Commodity Futures Trading Commission (CFTC),⁵⁴ a state securities regulator,⁵⁵ or a

43. Draft Consumer Financial Protection Agency Act of 2009 (proposed by U.S. Treasury Dept. June 30, 2009), <http://www.financialstability.gov/docs/CFPA-Act.pdf>.

44. *Id.* § 1002(8).

45. *Id.* § 1002(18).

46. *Id.* § 1002(9).

47. *See id.* § 1002(16) (defining “enumerated consumer laws”).

48. *See* H.R. 4173, 111th Cong. (2009).

49. *See id.* § 4203.

50. *See id.* § 4205(j).

51. *See id.* § 4205(k).

52. *See id.* § 4205(a).

53. *See id.* § 4205(b).

54. *See id.* § 4205(c).

55. *See id.* § 4205(d).

state insurance regulator⁵⁶ are also excluded from the CFPA's jurisdiction. Federal home loan banks⁵⁷ and farm credit system banks,⁵⁸ employee benefit plans,⁵⁹ certified public accountants and tax preparers,⁶⁰ lawyers,⁶¹ pawnbrokers,⁶² manufactured home and modular home retailers,⁶³ credit reporting agencies,⁶⁴ and tax exempt charities⁶⁵ are beyond the reach of the CFPA. The CFPA would be prohibited from establishing a usury limit on consumer loans.⁶⁶

The obvious conclusion is that affected industries are lobbying successfully to be exempt from consumer protection supervision and accountability. The more holes Congress creates in the net, the less effective this legislation will be for consumers.

D. Three Related Questions: (1) Should a New Consumer Financial Protection Agency Have Centralized Rulemaking Authority for Existing and Future Consumer Protection Laws; (2) What Examination and Enforcement Authority Should a New Consumer Financial Protection Agency Have; and (3) How Should that Authority Be Coordinated with Other Regulators?

In the current House Bill 4173, the CFPA has been given rulemaking authority⁶⁷—with the requirement that the new agency must conduct a cost/benefit analysis, taking into account consumers, regulated entities, and the Federal Government.⁶⁸ The new agency is directed to consider particularly “the potential reduction of consumers’ access to consumer financial products or services”⁶⁹ that could result from any given regulation. The CFPA’s rulemaking authority can be exercised only after consulting with the federal banking agencies, State bank supervisors, the Federal Trade Commission (FTC), and any other appropriate federal agency, “regarding the consistency of a proposed regulation with prudential, consumer protection, civil rights, market, or systemic objectives,”⁷⁰ as well as whether the proposed regulation may have an inconsistent effect as between depository institutions and non-depository institutions.⁷¹ In short,

56. *See id.* § 4205(e).

57. *See id.* § 4205 (f).

58. *See id.* § 4205(g).

59. *See id.* § 4205(h).

60. *See id.* § 4205(i).

61. *See id.* § 4205(n).

62. *See id.* § 4205(o).

63. *See id.* § 4205(m).

64. *See id.* § 4205(p).

65. *See id.* § 4205(r).

66. *See id.* § 4205(l).

67. *See id.* § 4202(b)(1).

68. *See id.* § 4202(b)(2).

69. *Id.*

70. *Id.*

71. *See id.*

the legislation has been “watered down”⁷² so that the CFPA would be given rulemaking authority in the consumer financial protection arena—but only in a way that will hamstring its ability to move quickly or decisively.

If meaningful rulemaking authority for the CFPA is difficult to achieve, examination authority is even more controversial. The OCC has been aggressively protective of its “exclusive visitorial powers” over national banks.⁷³ The current legislation does grant to the CFPA authority to conduct periodic examinations, “without regard to charter or corporate form, based on the Director’s assessment of the risks posed to consumers in relevant product markets and geographic markets.”⁷⁴ With this language, Congress would overrule the United States Supreme Court’s 2007 decision in *Watters v. Wachovia Bank*,⁷⁵ holding that operating subsidiaries of national banks are subject to examination and enforcement only by the OCC. The Court’s 2009 decision in *Cuomo v. Clearing House Association*⁷⁶ would also be overturned to the extent of its holding that only the OCC can examine and request documents from national banks to determine violations of consumer protection laws.

In conducting supervisory activities, the CFPA would be required to coordinate with federal and state banking agencies regarding examination schedules and required reports.⁷⁷ The CFPA is also directed to use reports already prepared for other regulators to the fullest extent possible.⁷⁸ The CFPA may delegate its examination authority to another regulatory agency, upon that agency’s petition.⁷⁹ Examination reports are to be shared, upon reasonable assurances of confidentiality, among the CFPA, federal agencies, and state agencies having jurisdiction over any covered entities.⁸⁰ The existing regulatory agencies may concede that the CFPA could address the “rulewriting gap” but strongly argue that, for insured depository institutions, implementation (examination and enforcement) of consumer protection laws should be left to the primary federal banking

72. See Michael Grunwald, *The Case for a Consumer Financial Protection Agency*, TIME, Feb. 17, 2010, <http://www.time.com/time/politics/article/0,8599,1964469,00.html> (describing need for consumer financial protection agency, lobbying efforts to block legislation, and arguments by banking industry and federal banking agencies that new agency is not needed).

73. See discussion *infra*, Part II.J. relating to federal preemption.

74. H.R. 4173, 111th Cong. § 4202(c) (2009).

75. See 550 U.S. 1, 41-43 (2007). For more information on this case, see Ann Graham, *Searching for Chevron in Muddy Watters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 250-53 (2008) (discussing majority and minority opinions as well as fact situation that precipitated case).

76. See 129 S. Ct. 2710, 2720-22 (2009).

77. See H.R. 4173, § 4202(c)(3).

78. See *id.* § 4202(c)(6).

79. See *id.* § 4242(c)(11).

80. See *id.* § 4202(c)(8).

regulators.⁸¹ This would leave only non-depository institutions under the full authority of the CFPA.

The CFPA would have primary enforcement authority for financial consumer protection compliance, but must coordinate with the Federal Trade Commission (FTC) and other agencies.⁸² The CFPA's investigation authority is intended to be conducted in cooperation with agencies having current authority over covered entities.⁸³ The CFPA would be granted the full panoply of administrative tools for civil investigation and administrative discovery, including subpoena power,⁸⁴ hearings, and adjudication proceedings.⁸⁵ The CFPA may grant administrative relief⁸⁶ in the form of: rescission or reformation of contracts; refund of moneys or return of real property; restitution; disgorgement or compensation for unjust enrichment; money damages; public notification regarding the violation; limits on future activities or functions; civil money penalties up to \$1,000,000 per day, according to a tiered structure correlating to severity of violation; and recovery of costs, but no exemplary or punitive damages.⁸⁷ The new agency would have litigation authority and may even appear before the Supreme Court to represent itself in its own name upon timely request to the U.S. Attorney General.⁸⁸ The pending legislation does not create a new private right of action for violation of consumer protection laws.⁸⁹ The CFPA would be authorized to make criminal referrals to the Attorney General.⁹⁰

The House-passed legislation creates new whistleblower protection.⁹¹ Employees of entities under the CFPA's authority may not be terminated or discriminated against for providing information to the CFPA, for testifying in administrative or enforcement proceedings, or because the employee "objected to, or refused to participate in, any activity policy, practice or assigned task that the employee . . . reasonably believed to be in violation of any law, rule, or regulation, or to be unfair, deceptive, or abusive and likely to cause specific and substantial injury to one or more consumers."⁹² The hope behind this section is similar to that for the

81. See, e.g., *Federal Regulator Perspectives on Federal Regulatory Reform: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 10-11 (2009) (statement of John C. Dugan, Comptroller of the Currency, Office of Comptroller of the Currency), [http://www.house.gov/apps/list/hearing/financialsvcs_dem/dugan_-_occ_\(resubmitted\).pdf](http://www.house.gov/apps/list/hearing/financialsvcs_dem/dugan_-_occ_(resubmitted).pdf).

82. See H.R. 4173, § 4202(e).

83. See *id.* § 4502.

84. See *id.*

85. See *id.* § 4503.

86. See *id.* § 4505.

87. See *id.* § 4505(a)(3).

88. See *id.* § 4504.

89. See *id.* § 4508.

90. See *id.* § 4506.

91. See *id.* § 4507.

92. See *id.* § 4507(a)(2).

whistleblower section of the Sarbanes Oxley Act of 2002:⁹³ that employees will step forward to avert the next crisis. Whistleblower protection has, at best, a mixed record in this regard.⁹⁴

H.R. 4173 would create a new Victims Relief Fund, held at Treasury, into which civil penalties obtained through judicial or administrative action by the CFPA shall be deposited. The CFPA would disburse these funds as restitution to victims. If victims cannot be located, five percent of the Victims Relief Fund, up to \$10,000,000 per year, would be transferred to the Secretary of the Treasury for the Financial Education and Counseling Grant Program established under the Housing and Economic Recovery Act of 2008.⁹⁵

E. Should a Consumer Financial Protection Agency Have a Single Head or Be Governed by a Multi-Member Board?

Composition of the new CFPA governing structure is a critical area of debate. One issue is the balance between independence from and cooperation with existing agencies. Another is whether the agency should be led by one director, who is capable of meeting the chairmen of other financial agencies with equal standing, or whether a multi-member board with staggered terms can best achieve independence from any one presidential administration. In the current legislation (H.R. 4173), governing structure for the CFPA represents a compromise between House Financial Services Chairman Frank's view favoring a single director and House Energy and Commerce Committee Chairman Henry Waxman's push for a multi-member commission.⁹⁶

In H.R. 4173, the CFPA would initially be led by a Director,⁹⁷ appointed by the President with advice and consent of the Senate.⁹⁸ On the "agency conversion date,"⁹⁹ two years after consumer protection functions of the Federal Reserve, OCC, OTS, FDIC, FTC, NCUA, and HUD are

93. Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802 (2002) (codified at 18 U.S.C. § 1514A).

94. See generally Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875 (2002).

95. Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified in scattered Sections of 12, 15, 26, 37, 38, and 42 U.S.C.).

96. See Silla Brush, *Reps. Frank, Waxman Square Off Over New Consumer Agency*, THE HILL, Oct. 28, 2009, <http://thehill.com/homenews/house/65301-frank-waxman-square-off-over-consumer-agency>; see also, Silla Brush, *Frank, Waxman Ironing Out Differences Over Financial Regulatory Agency*, THE HILL, Dec. 3, 2009, <http://thehill.com/homenews/house/70495-frank-waxman-ironing-out-differences-over-consumer-financial-regulatory-agency>.

97. See H.R. 4173, § 4101(b).

98. See *id.* § 4102(b)(2).

99. See *id.* § 4002(38).

transferred to the CFPA,¹⁰⁰ the governing structure of the CFPA would change from a single Director to a five-member Commission.¹⁰¹ Commission members would be appointed by the President, with the advice and consent of the Senate, to serve five-year staggered terms.¹⁰² Continuity in the change-over is assured by a provision that the first Chair of the Commission shall be the person serving as Director at that time.¹⁰³ Commission members are required to have “strong competencies and experiences related to consumer financial protection”¹⁰⁴ and to engage in no other employment during their terms.¹⁰⁵ Bipartisanship would be fostered by the staggered terms and by the provision that not more than three Commission members may be of the same political party.¹⁰⁶

In addition to the initial Director and the Commission that follows, there would be a twelve-member Consumer Financial Protection Oversight Board. Seven members comprise the heads of the Federal Reserve, the chartering authority for national banks, the FDIC, the NCUA, the FTC, HUD, and the liaison committee of State agencies to the Federal Financial Institutions Examination Council (FFIEC).¹⁰⁷ Five additional members would be appointed by the President, with the advice and consent of the Senate, from among experts in the fields of consumer protection, fair lending and civil rights, and depository institutions who primarily serve underserved communities or communities that have been significantly impacted by higher-priced mortgage loans.¹⁰⁸ The Oversight Board would have only advisory authority, providing information about the consistency of consumer financial protection regulations with prudential, market, or systemic objectives.¹⁰⁹

The CFPA would not lack for advice and counsel. In addition to the Oversight Board, the CFPA would appoint a Consumer Advisory Board,¹¹⁰ not more than half of whose members may be of the same political party. The CFPA would also coordinate with the SEC, the CFTC, the Secretary of the Treasury, the FTC, and other Federal and state agencies,¹¹¹ as well as with each agency that is a member of the Financial Literacy and Education

100. *See id.* § 4601-02 (providing for transfer of consumer financial protection functions to CFPA and setting “designated transfer date” as 180 days after passage of final legislation).

101. *See id.* § 4103.

102. *See id.* § 4103(b).

103. *See id.* § 4103(d)(1).

104. *Id.* § 4103(b)(1)(B).

105. *See id.* § 4103(b)(3)(E).

106. *See id.* § 4103(c).

107. *See id.* § 4104(c).

108. *See id.* § 4101(d).

109. *See id.* § 4104(b).

110. *See id.* § 4107.

111. *See id.* § 4108(a).

Commission.¹¹² The CFPA must make reports to Congress¹¹³ and be audited by the Government Accountability Office (GAO).¹¹⁴

Not only does H.R. 4173 provide direction regarding governing structure, it also provides extensive detail about internal organization for the CFPA. The Director or the Commission is to appoint an Ombudsman to advise consumers who may have a claim against a federal agency involving consumer financial products, to provide information for consumers and agencies, and to assist small institutions with compliance obligations.¹¹⁵ The CFPA must have a Research Division, a Community Affairs Division concerned with underserved communities, a Consumer Complaints Division, a Consumer Financial Education Division,¹¹⁶ an Office of Financial Protection for Older Americans,¹¹⁷ and an Office of Fair Lending and Equal Opportunity.¹¹⁸ The CFPA must have a single toll-free telephone number for consumer complaints and inquiries, from which the agency may route appropriate calls to State and Federal financial institution regulatory agencies in addition to handling matters in house.¹¹⁹ The CFPA must establish a public interagency Web site to receive and direct consumer complaints.

With all the strings attached to the CFPA's authority to assure consumer financial protection, one cannot help but recall Lemuel Gulliver tied down by Lilliputians.¹²⁰ In addition, one recalls the lobbyist's creed: 'Tis better to amend a problem bill into ineffectuality than to incur public wrath by direct opposition.¹²¹

F. *How Will the New Consumer Financial Protection Agency Be Staffed?*

Each of the existing federal bank regulatory agencies will transfer its current consumer protection functions and personnel to the CFPA.¹²² This assures expertise and minimizes start-up time for the new agency. The greatly expanded jurisdiction over new entities, products, and services will, however, require the new agency to recognize and allocate staff resources among at least three models for regulation. I describe these as: (1) "*examination-driven*" regulation, which is highly staff intensive because it is based on periodically scheduled on-site visitation; (2) "*complaint-driven*"

112. *See id.* § 4108(b).

113. *See id.* § 4109 (requiring reports to President and Congress at each regular session of Congress); *see also id.* § 4110 (requiring GAO study of effect of CFPA regulations on small businesses, with report to Congress).

114. *See id.* § 4113.

115. *See id.* § 4106(a)(4).

116. *See id.* § 4106(c).

117. *See id.* § 4106(f).

118. *See id.* § 4106(g).

119. *See id.* § 4104(d).

120. *See* JONATHAN SWIFT, GULLIVER'S TRAVELS (1726).

121. Unfortunately, the author credits only personal experience.

122. *See* H.R. 4173, § 4601, *et seq.* The "designated transfer date" is to be 108 days after enactment of the legislation. *See id.* § 4602.

regulation, which is less staff intensive and less comprehensive because it calls for regulatory attention only when triggered by a certain level of consumer complaints; and (3) “*report-driven*” *regulation*, which is like the current review of Home Mortgage Disclosure Act (HMDA) data by the Federal Reserve Board that analyzes information required to be submitted and produces a report lagging real time by almost two years.

Before the new agency gets up and running, it would be advisable to review the start-up experiences of at least two other recent examples of new agencies that consolidated and expanded on the mission of existing agencies: The Resolution Trust Company (RTC), created in response to the savings-and-loan meltdown in the 1980s and early 1990s,¹²³ and the Public Accounting Oversight Board, created in response to the Enron/Arthur Andersen accounting scandal.¹²⁴

G. *What Funding Structure Is Optimal?*

The Obama Administration’s original plan outlined in the White Paper calls for the CFPA to be “independent” of the industries it regulates. As background, the existing federal banking agencies are funded, not through taxpayer monies but through charter fees and assessments raised from the entities they regulate. This provides a perverse incentive for agencies to compete with each other to provide the most favorable, least restrictive regulation to increase the number and size of institutions they regulate. “Captive” regulators are incented to market their charters as a way to escape consumer protection statutes.

H.R. 4173 calls for the agency to be funded: (1) through an annual transfer of funds from the Federal Reserve equal to ten percent of the Federal Reserve System’s total system expenses;¹²⁵ (2) through fees, based on size, complexity of risk, and compliance record,¹²⁶ assessed by the

123. See *Learning from the Past: Lessons from the Banking Crises of the Twentieth Century*, Hearing before the Congressional Oversight Panel, 111th Cong. (2009) (statement of David C. Cooke, Former Executive Director, Resolution Trust Company), <http://cop.senate.gov/documents/testimony-031909-cooke.pdf>.

124. The PCAOB was “created by the Sarbanes-Oxley Act of 2002 to oversee the auditors of public companies in order to protect investors and the public interest by promoting informative, fair, and independent audit reports.” See About the PCAOB, <http://pcaobus.org/Pages/default.aspx> (last visited Mar. 17, 2010). Although the PCAOB is a private sector, non-profit corporation, the similarity of its mission—to protect public interests and promote confidence in a key component of the sound operation of U.S. financial markets—makes it a good source of experiential learning regarding agency start-up successful strategies and potential pitfalls.

125. See H.R. 4173, 111th Cong. § 4111(a) (2009).

126. See *id.* (noting that legislation contains complex limitations on fees and assessments, as well as requirements to coordinate funding with existing agencies during initial transition period).

CFPA on entities regulated by the CFPA;¹²⁷ and (3) in the start-up years, 2010 through 2014, Congress would appropriate \$200,000,000 per year to the CFPA.¹²⁸ The Treasury Department would hold CFPA funds in two separate accounts: The Consumer Financial Protection Agency Depository Institution Fund¹²⁹ and the Consumer Financial Protection Agency Nondepository Institution Fund.¹³⁰ Funds from assessments levied on either depository or nondepository institutions are to be deposited into the appropriate fund and not commingled.¹³¹ Costs and expenses of operating the CFPA, including personnel, administrative, and other overhead expenses, must be allocated to the appropriate fund and strictly accounted for, although the CFPA may use the same facilities and resources in supervising and regulating depository and nondepository institutions.¹³²

This mix of funding is designed to insulate the CFPA from “regulatory capture,” which can occur when an agency is funded solely from its regulated constituents. While equitable arguments can be made that one segment of regulated entities should not be taxed for supervision of another segment, it is readily apparent that splitting the CFPA funds into “depository institution” and “nondepository institution” will engender future turf wars. On its face, such a complex funding system appears unworkable.

H. *Should Financial Institutions Be Required to Offer “Plain Vanilla” Financial Products?*

A key component of the original proposal for a consumer financial protection agency was a requirement that lenders offer “plain vanilla” products that are simple, straightforward, clearly understandable to consumers, capable of being easily compared with other products to obtain the best deal, and less risky for consumers.¹³³ The idea was that borrowers would be offered “plain vanilla” thirty-year fixed mortgages first, and could “opt in” to more complicated financial products after being advised of the risks.¹³⁴ Michael Barr, Treasury Department Assistant Secretary for Financial Institutions, explains that “the ‘plain-vanilla’ financial products have

127. *See id.* § 4111(b). However, no examination fees are to be assessed against small banks and credit unions that will not be examined by the CFPA, but by their primary federal regulator. *See id.* § 4111(b)(3)(B)(ii).

128. *See id.* § 4111(c).

129. *See id.* § 4111(d).

130. *See id.* § 4111(e).

131. *See id.* § 4111(f).

132. *See id.*

133. *See* Posting of Elizabeth Warren to Consumer Reports’ MoneyBlog, <http://blogs.consumerreports.org/money/2009/08/consumer-reports-consumer-financial-protection-agency-elizabeth-warren-interview-cfpa-plain-vanilla-mortgage-banks-lenders-fi.html> (Aug. 17, 2009) (explaining “plain vanilla” financial products provisions of original CFPA legislation).

134. *See* Amy Hoak, *Making Mortgages More “Vanilla,”* BOSTON HERALD, Sept. 11, 2009, <http://www.responsiblelending.org/tools-resources/headlines/making-mortgages-more-vanilla.html>.

their roots in behavioral economics and psychology. It isn't enough to provide consumers with more disclosure and more information, since people often get easily overwhelmed and make mistakes."¹³⁵ Financial institutions would be able to continue offering more complex financial products to sophisticated customers.¹³⁶

The "plain vanilla" requirement was included in H.R. 3126 as originally filed in the House,¹³⁷ but it quickly met objections from the banking industry that "plain vanilla" mortgages would cut into profitably and make departing from the "plain vanilla" menu more risky for financial institutions.¹³⁸ It may be hard to understand why this was a persuasive argument in light of the damage done by complicated "teaser rate" Adjustable Rate Mortgages (ARMs); nevertheless, the "plain vanilla" products requirement was one of the first provisions of the legislation to be negotiated away.¹³⁹ H.R. 4173, as passed by the House, contains an express provision that the CFPA will have no authority to require the offering of financial products or services.¹⁴⁰

I. *Will a New Consumer Financial Protection Agency Result in More Government Regulation, Stifle "Innovation," and Increase the Cost of Financial Products and Services?*

Opponents of financial reform almost always begin with an argument that more government regulation will increase regulatory burden on financial institutions, stifle innovation, and increase the cost of financial products and services—which will ultimately be borne by consumers.¹⁴¹ This argument has several component parts that deserve response. First, a key cause of the financial crisis was lack of regulation (not excessive regulation) and lack of government oversight in many parts of the mortgage lending market. Second, "innovation" for its own sake is not necessarily good. Columbia Business School Professor Stiglitz, winner of the 2001 Nobel Prize in Economics for work relating to financial markets and incentives, has addressed this argument succinctly:

135. Jane J. Kim, *Plain-Vanilla Financing Could Melt Bank Profits*, WALL ST. J., June 29, 2009, <http://online.wsj.com/article/SB124597610438257573.html>.

136. *See id.* (quoting Joseph Longino as saying that, "You'd see the plain-vanilla 'Good Housekeeping Federal Seal of Approval' on products for lower-income consumers . . . and more innovative products offered to wealthier, sophisticated consumers").

137. *See* H.R. 3126, § 136.

138. *See* Kim, *supra* note 135.

139. *See* Anne Flaherty, *Congress Wary of "Plain Vanilla" Bank Proposal*, ABCNEWS/MONEY, Sept. 22, 2009, <http://abcnews.go.com/Business/wireStory?id=8638900>.

140. *See* H.R. 4173, § 4311.

141. *See Perspectives on the Consumer Financial Protection Agency: Hearings Before the H. Comm. on Fin. Servs.*, 111th Cong. (2010) (statement of Edward Yingling, President and CEO, American Bankers Association), <http://www.aba.com/NR/rdonlyres/222CE044-577A-11D5-AB84-00508B95258D/62711/Sept30EdYinglingHFSC.pdf>.

Our financial markets not only mismanaged risk—and created products that increased the risk faced by others—but they also failed to create financial products that would help ordinary Americans face the important risks that they confronted, such as the risks of home ownership or the risks of inflation. Indeed, I am in total agreement with Paul Volcker [Chairman of the Federal Reserve Board from 1979-1987]—it is hard to find evidence of any real growth associated with the so-called innovations, though it is easy to see the link between those innovations and the disaster that confronted our economy.¹⁴²

Third, any argument that continued lack of centralized, focused consumer financial protection regulation and enforcement will result in increased costs to consumers is disingenuous. How can we forget the costs to consumers and the U.S. economy resulting from the subprime mortgage “innovations?” Professor Warren identifies and counters three myths about the Consumer Financial Product Agency: (1) that it will limit consumer choice and hinder innovation; (2) that it will add another layer of regulation and increase regulatory burden; and (3) that prudential and consumer regulation cannot be separated.¹⁴³

J. *Can States Retain Concurrent Authority Over Consumer Financial Protection, and If So, What is the Appropriate Measure of Federal Preemption in the Financial Institutions Arena?*

The Consumer Financial Protection Agency Act, as it now stands, devotes an entire subtitle to “Preservation of State Law,”¹⁴⁴ explicitly providing that State law is not preempted “except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this title and then only to the extent of the inconsistency.”¹⁴⁵ The purpose and effect of this language is to reject and remove legal authority for claims of “field preemption” with regard to consumer protection and federally chartered financial institutions. Under this legislation, if passed, State consumer protection law would be examined on a case by case basis for “conflict preemption.”¹⁴⁶

142. *Compensation in the Financial Industry: Hearings Before the H. Comm. on Fin. Servs.*, 111th Cong. (2010) (statement of Dr. Joseph E. Stiglitz, Professor, Columbia University), http://www.house.gov/apps/list/hearing/financialsvcs_dem/stiglitz.pdf.

143. See Warren, *supra* note 38.

144. See H.R. 4173, § 4401.

145. *Id.* § 4401(a).

146. See *Fidelity Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (identifying three categories of federal preemption of state law: express preemption, conflict preemption, and field preemption). Because this Congressional change in the type of preemption from “field” to “conflict” would give States dramatically more ability to adopt and enforce their own consumer financial protection laws, it is important to reexamine the Supreme Court’s definitions. First, the *de la Cuesta* opinion explains that the basis for the federal preemption doctrine is

The Act goes on to provide that State law is not inconsistent with the provisions of this law if the State statute, regulation, order, or interpretation affords consumers greater protection.¹⁴⁷ This federal consumer protection law would establish a floor, a basic level of required consumer protection, but permit the States to adopt stricter standards.¹⁴⁸

With the language of H.R. 4173, § 4401, Congress would directly address federal agency assertions of preemption that blocked State consumer protection efforts even as predatory lending abuses escalated, contributing to the “subprime mortgage meltdown.” Congress would expressly roll back a tide of agency interpretations and regulations, together with lower court opinions upholding them—and nullify parts of two recent U.S. Supreme Court decisions:¹⁴⁹ *Watters v. Wachovia*¹⁵⁰ and *Cuomo v. Clearing House Ass’n*.¹⁵¹ The development of federal preemption in the financial institutions arena leading up to the House-passed legislation has been extensively analyzed;¹⁵² therefore, this commentary is limited to noting the effect of potential new statutory language.

Congressional testimony from consumer advocates, state financial institution regulators, and state attorneys general demonstrates support to end the blanket preemption that allowed federally chartered financial institutions and their affiliates to adopt the shield of federal preemption and escape state consumer protection laws.¹⁵³ Congressional testimony from

the Supremacy Clause of the U.S. Constitution, giving rise to *express preemption* when “Congress’ command is explicitly stated in the statute’s language.” *Id.* at 153 (quoting *Jones v. Roth Packing Co.*, 430 U.S. 519, 525 (1977)). *Conflict preemption*, a second category in which preemption is implied rather than expressed, exists in two situations. *Id.* One is when “compliance with both state and federal regulations is a physical impossibility.” *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Another is when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Finally, *field preemption*, the broadest of the three categories, exists when “the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Id.* at 152 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

147. See H.R. 4173, § 4401(a)(2).

148. See generally, Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 918 (2009) (discussing other federal statutes that establish “floor” and allow states to impose stricter standards).

149. For a discussion of the impact of the congressional language, see *supra* notes 74-76 and accompanying text.

150. 550 U.S. 1 (2007).

151. 129 S. Ct. 2710 (2009).

152. See, e.g., Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. REG. 143, 163-89 (2009) (providing chronology of legal developments in federal preemption for financial institutions); Michael C. Tomkies, Ralph T. Wutscher, David L. Beam & Elizabeth L. Anstaett, *Defining the Scope of Federal Preemption: State Farm, Exclusive Agents, and Other Emerging Issues*, 64 BUS. LAW. 605 (2009) (outlining development and scope of federal preemption in financial institutions arena up to the passage of H.R. 4173).

153. For a discussion of various opponents to blanket preemption, see *supra* note 34 and accompanying text.

federal regulatory agencies¹⁵⁴ and the financial services industry¹⁵⁵ shows opposition to these limitations on federal preemption.

III. POLITICAL REALITIES AND THE *CITIZENS UNITED* CASE: CONCLUSIONS AND PROGNOSTICATIONS ABOUT THE CFPA

The immediate fate of the CFPA and financial regulatory reform as a whole currently rests in the hands of the U.S. Senate.¹⁵⁶ News bulletins throughout early spring 2010 have carried all the thrill and uncertainty of a roller coaster ride:

- January 15, 2010: *Consumer Protection Agency in Doubt*,¹⁵⁷
- January 16, 2010: *Senator Dodd May Drop Push for Consumer Financial Protection Agency*,¹⁵⁸
- February 5, 2010: *Talks with G.O.P. on Financial Bill at 'Impasse,' Dodd Says*¹⁵⁹
- February 9, 2010: *Business Owners Say Consumer Financial Protection Agency Would Protect Businesses and Economy*,¹⁶⁰ and
- February 25, 2010: "[T]he fate of a consumer financial protection entity remains a key sticking point in the Senate negotiations, sharply dividing Republicans and Democrats."¹⁶¹

Partisanship plays a critical part in this debate. No House Republicans voted for H.R. 4173. Money plays another major role. According to President Obama, financial institutions spent more than \$300,000,000 in 2009 lobbying for their positions on financial regulatory reform.¹⁶²

154. For an overview of Congressional testimony from federal regulatory agencies, see *supra* note 35 and accompanying text.

155. For a summary of testimony from the financial industry, see *supra* note 36 and accompanying text.

156. A political axiom: When the legislature's in session, lock up your children and dogs. Anything can happen.

157. See Damian Paletta, *Consumer Protection Agency in Doubt*, WALL ST. J., Jan. 15, 2010, <http://online.wsj.com/article/SB10001424052748704363504575003360632239020.html>.

158. See Brady Dennis & Binyamin Appelbaum, *Sen. Dodd May Drop Push for Consumer Financial Protection Agency*, WASH. POST, Jan. 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/15/AR2010011504054.html>.

159. See Sewell Chan, *Talks with G.O.P. on Financial Bill at 'Impasse,' Dodd Says*, N.Y. TIMES (Feb. 5, 2010), <http://www.nytimes.com/2010/02/06/business/06regulate.html>.

160. Press Release, Main Street Alliance, *Business Owners Say Consumer Financial Protection Agency Would Protect Business and Economy* (Feb. 9, 2010), <http://mainstreetalliance.org/wordpress/national/1946/>.

161. Jim Kuhnhen, *Federal Reserve Comes in from Senate Deep Freeze*, FORBES, Feb. 25, 2010, http://www.forbes.com/feeds/ap/2010/02/25/general-us-financial-overhaul_7388914.html.

162. See President Barack Obama, Weekly Address (Dec. 12, 2009), <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-applauds-important-step-forward-financial-reform>.

In the midst of all the congressional drama comes a Supreme Court decision that will also impact the outcome of the proposed CFPA and financial regulatory reform legislation. On January 21, 2010, the U.S. Supreme Court issued its opinion in *Citizens United v. Federal Election Commission*.¹⁶³ Acting as the perennial swing-vote, Justice Anthony Kennedy wrote the majority opinion. The five-four decision eliminated key federal campaign finance restrictions—and consequently overturned state restrictions that have prohibited corporations and unions from paying for ads that support or oppose a particular candidate.¹⁶⁴ With mid-term elections slated for Fall 2010, members of Congress will be looking to their home constituencies as well as major interest groups and the campaign money marshaled to spend on issues of financial regulatory reform.

In the final analysis, having considered pros and cons for the principal points of logical contention over whether Congress should establish an independent consumer financial protection agency, we must return to practicalities: campaign contributions, partisanship, and political will.

163. See 130 S. Ct. 876 (2010); see also Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html>.

164. See *Citizens United*, 130 S. Ct. at 882.